IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 489 of 1994

with

CRIMINAL APPEAL No 734 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GOKAL NANDAJI AHIR

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 489 of 1994
MR PM VYAS for Petitioner
MR KP RAVAL, APP, for Respondent No. 1

2. Criminal AppealNo 734 of 1994
MR PM VYAS for Petitioner
MR KP RAVAL, APP, for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT
and
MR.JUSTICE J.R.VORA

Date of decision: 24/07/2000

ORAL JUDGEMENT(Per J.N.Bhatt, J.)

Since both these conviction appeals, under section 374 of the Code of Criminal Procedure 1973 (Cr.P.C.) arise out of one judgment and order, at the instance of two original accused, and raise identical questions, upon consensus and for convenience, both the appeals are heard together and are being disposed of by this common judgment.

Criminal Appeal No.489/94 is, at the instance of original accused No.1, whereas, Criminal Appeal No.734/94 is at the instance of original accused No.2, who have been held guilty for having committed offences punishable under sections 17, 18, 22 read with section 29 of the Narcotic Drugs and Psychotropic Substance Act, 1985 (NDPS Act, for short) in Sessions Case No.39/92, by recording impugned judgment and order on 9.3.94. Each of the accused persons is sentenced to undergo 10 years imprisonment and to pay fine of Rs.1 lac and in default to undergo two years RI under section 18 read with section 29 and also similar sentence under section 22 read with section 29 of the NDPS Act. Sentences are ordered to run concurrently.

A short spectrum of facts giving rise to these appeals may be narrated, first.

On 9.3.92, at about 4.30 a.m., both the appellants, original accused persons, were to pass on a Rajdoot Motorcycle bearing No.GJ-8-4891 with narcotic substance, as per the information received by the Police at Vijaynagar Police Station. Therefore, raiding party consisted of Constable, PSI and Circle Police Inspector (DYSP) along with two panchas, namely, N.S.Shah and M.A.Kalal, got away and reached near the Rani Check Post, so as to prevent the accused from proceeding further and to arrest them.

On that date, about 3.00 a.m. Rajdoot Motorcycle came from Kherwada, driven by accused No.1, Gokal Nandaji and pillion occupied by accused No.2, Omkardas Parshuram, which was stopped by the Police. In the meantime, one of the accused, (accused No.2), taking advantage of the darkness, fled away from the said venue. The police got the trunk of the motorcycle opened from which contraband

article was found wrapped in plastic a bag. After, observing necessary procedure and weighing, it was collected by the Police which was 6 k.g. and 300 gram of opium worth about Rs.50,000/- as per the then prevalent market price. Accused persons were importing the said contraband article from Rajasthan to Gujarat. The sample on being analysed by the Forensic Science Laboratory was confirmed to be prohibited and contraband article like opium, for which accused persons had no permit or pass. After the complaint, the matter was investigated and accused persons were chargesheeted and came to be charged in Sessions Case No.39/92 under section 17, 22 read with section 29 of the NDPS Act, by the Trial Court.

Accused denied the charges and as a result, in order to substantiate the charges aginst the persons, prosecution placed reliance on seven witnesses and also placed reliance on documentary evidence, to which, reference will be made by us, as and when required, hereinafter. Upon appreciation and evaluation of the evidence of the prosecution, the Trial Court found both the accused persons guilty for illegal and unauthorised possession of contraband article, opium, by holding that the muddamal opium weighing 6.300 k.g. found from the trunk of the motorcycle of accused No.2 driven by accused No.1 was in violation and breach of the provisions of NDPS Act and holding them guilty convicted, as stated hereinabove.

The learned advocate for the appellants, Mr Vyas, firstly, placed reliance on the provisions of section 50 of the NDPS Act. He contended that the concerned Police Officer failed to observe the mandatory provisions of section 50 as accused persons were not asked as to whether they would like to be searched in presence of a Gazetted Officer of any of the Departments mentioned in section 42 or to the nearest Magistrate. It was, therefore, submitted that the statutory mandate and the safeguard is not observed, in the present case, and therefore, accused persons are entitled to be acquitted as section 50 of the NDPS Act is mandatory.

Secondly, he submitted that there is a breach of the provisions of section 42 of the NDPS Act and, therefore, also, the impugned judgment and order is illegal, as the trial shall vitiate for non-observance of the mandatory provisions of section 42 of the NDPS Act. Aforesaid two contentions are, seriously, countered by the learned Addl. Public Prosecutor, who has, fully, supported the impugned judgment and order. We have, extensively, heard the learned advocate for the appellants and the learned Additional Public Prosecutor and have, also,

dispassionately, examined the entire record, threadbare.

Needless to mention that there is a purpose and policy behind enacting the provisions of sections 42 and 50 of the NDPS Act. With a view to ensure that the Officers, incharge of search and seizure, remain fair to the accused persons, statutory safeguards are provided as valuable civil liberty of a person is, at stake. This proposition is, extensively, acclaimed, proclaimed and expounded and it would not detain us any longer to meticulously and minutely explore, any further.

In so far as the first contention raised by the learned advocate for the accused is concerned, it may be mentioned that the provisions of section 50 would not be attracted as the muddamal contraband opium was seized by the Police not in course of the search of person of the accused, but from the trunk of the motorcycle. It is a settled proposition of law that the conditions under which search of person shall be conducted are prescribed in section 50 and they do not come into play, in case of a search of premises or vehicles. When any officer below the authorised officer under section 42 before making a search of a person under the provisions of section 41 or under section 42 or for that purpose, under section 43, is obliged to inquire from the person sought to be searched as to whether he (accused) would like to be so searched by the Police in presence of a gazetted officer of any of the departments mentioned in section 42 or the nearest Magistrate. The wholesome and healthy philosophy and desideratum behind providing such a provision is to see that the accused receives fair and just treatment and to obviate any manipulation by the authority concerned. Section 50, therefore, could be pressed into service, successfully, provided in a case of a search of a person. In the present case, so is not the factual situation. It has remained unquestionable that the contraband opium weighing more than 6 k.g. was searched and seized by the Police, at the relevant time, from the trunk of the motorcycle, on which the accused persons were proceeding towards Gujarat State from Rajasthan side. Therefore, there is no question of personal search involved in the present case. The search was of the motorcycle. When search of motorcycle or any other vehicle, etc. is involved, the provisions of section 50 would not be attracted. The requirement to ask the accused whether he wants to be searched in presence of a gazetted officer or a Magistrate could be projected or pressed into service as prescribed in section 50, only in case of a search of a person. Therefore, in a case of search of a vehicle, section 50 is not attracted. When the search was

required to be made of a vehicle also, and not only of the person of the accused and, therefore, it has been held that section 50 is not attracted. Thus there is a clear, evident and unambiguous answer to the first contention raised by the learned advocate for the appellants and, therefore, it has to be rejected.

Obviously, that would lead us to the examination and appreciation of the second contention raised by the learned advocate for the appellants. In our opinion, considering the fact situation emerging from the record of the present case and the settled proposition of law, second contention, also, is meritless and deserves to be rejected. It may be stated that in Chapter V of the NDPS Act, procedure is prescribed for various stages in course of search, seizure, disposal of muddamal, etc. However, we are, only, concerned with section 41, 42 and 43 of the NDPS Act.

Section 41 prescribes power to issue warrant and authorisation. It reads as under :

"41. Power to issue warrant and authorisation -(1) A metropolitan Magistrate or a Magistrate of the first class or any Magistrate of the second class specially empowered by the State Government in this behalf, may issue a warrant for the arrest of any person whom he has reason to believe to have committed any offence punishable under Chapter IV, or for the search, whether by day or by night, of any building, conveyance or place in which he has reason to believe any narcotic drug or psychotropic substance in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed.

(2) Any such officer or gazetted rank of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer of the revenue, drugs control, excise, police or any other department of the State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken in writing that any

person has committed an offence punishable under Chapter IV or that any narcotic drug, or psychotropic substance in respect of which any offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence has been kept or concealed in any building, conveyance or place, may authorise any officer subordinate to him but superior in rank to a peon, sepoy, or a constable, to arrest such a person or search a building, conveyance or place whether by day or by night or himself arrest a person or search a building, conveyance or place.

(3) The officer to whom a warrant under sub-section (1) is addressed and the officer who authorised the arrest or the office who is so authorised under sub-section (2) shall have all the powers of an officer acting under section 42."

Section 42 provides wide power of entry, search, seizure and arrest without warrant or authorisation. Since contention is raised that there is breach of provisions of sub-section (1) of section 42, which is mandatory, it would be necessary to refer to the provisions of section 42, at this juncture:

"42. Power of entry, search, seizure and arrest without warrant or authorisation. -- (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish

evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset,--

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise after recording the grounds in his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his behalf under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior."

It is contended on behalf of the State that taking into account the aforesaid provisions of section 41 and 42 and the admitted facts, in so far as the authority, which has conducted the search and seizure, thereis no doubt that this is not a case where section 42 (1) shall be attracted. It is further submitted that the case on hand deals with the fact situation which is covered by the provisions of section 41(2) of the NDPS Act. The head of the raiding party was Circle Inspector, (DYSP), who is, admittedly, a gazetted officer and an authorised person under sub-section (2) of section 41. In such a situation, the inhibition and the statutory requirement prescribed in section 42 to articulate the information received and to transmit it to the higher-ups would not come into play. Apart from such submissions the higher or superior authority was informed as required, on facts. Therefore, also, the second contention of defence is meritless.

Obviously, the provisions of section 35 and 54 of the NDPS Act, also, therefore, would be attracted. The Trial Court has, awarded minimum sentence. In our opinion, therefore, the impugned judgment and order can not be said to be vulnerable requiring our interference. We, therefore, hereby confirm it by dismissing both the appeals filed by the accused persons.

In the result, both the appeals, at the instance of the accused persons, are rejected.

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